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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1905.**

**Nos. 199 and 200.**

**ANTONIO JOSÉ AMADEO, FOR THE USE OF AND  
TOGETHER WITH THE PASTOR MARQUEZ COMPANY,  
IN LIQUIDATION, PLAINTIFFS IN ERROR,**

**vs.**

**THE NORTHERN ASSURANCE COMPANY**

**AND**

**SAME**

**vs.**

**THE ROYAL INSURANCE COMPANY.**

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF PORTO RICO.**

**BRIEF ON BEHALF OF THE DEFENDANTS IN  
ERROR**

**FRANCIS H. DEXTER,  
FREDERIC D. MCKENNEY,  
JOHN SPALDING FLANNERY,  
*Attorneys for Defendants in Error.***



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## **STATEMENT OF FACTS IN CASE No. 199.**

This action was begun on the 21st day of April, 1903, by Antonio José Amadeo as the sole plaintiff, to recover from the Northern Assurance Company damages in the sum of

\$10,000 on account of a certain fire insurance policy issued by the latter in favor of the former on certain property situated in Porto Rico.

The policy was dated December 21, 1884, and insured the plaintiff against loss and damage by fire to the extent of 3,100 pesos, or, say, \$2,480, for one year from said date.

The loss is alleged to have occurred February 7, 1885. Defendant pleaded several pleas to plaintiff's declaration, among others that "the alleged cause of action did not accrue within fifteen years before this suit" (R., 7), and that prior to the institution of this suit the said policy and the proceeds thereof had been transferred, sold and assigned by the plaintiff under a notarial document dated May 2, 1885, "to the firm of Pastor Marquez and Company, who are the only persons entitled to sue herein" (R., 8).

To both of these pleas the plaintiff at first demurred (R., 10), but subsequently by leave of court amended his declaration by adding to the caption, after the name Amadeo, the words "for the use of and together with Pastor Marquez Company, in liquidation," and by inserting in the body of the declaration the following :

"And plaintiff avers that about the month of August 1885 the said policy was assigned to the Pastor Marquez Company which is a company in liquidation and of which Pedro Salazar is liquidator" (R., 12).

Thereafter plaintiff's demurrer to defendant's pleas of prescription was pressed and was overruled by the court, to which ruling plaintiff excepted (R., 13) and subsequently replied that the prescription pleaded had been interrupted "extrajudicially." To such replication defendant interposed a demurrer, which was sustained by the court (R., 15).

The plaintiffs thereupon declined to plead further, and the court being of opinion that defendant's plea of prescription constituted a good defense entered judgment upon the entire pleadings as follows :

"And it is therefore adjudged by the court that issue is found in favor of the defendant and that the plaintiffs recover nothing herein and that defendant go hence with judgment for cost against the plaintiffs" (R., 15).

This judgment was entered January 12, 1904 (R., 14).

The plaintiff Amadeo died intestate May 14, 1904. (See suggestion of death and affidavit in support thereof filed in clerk's office; *post*, Appendix A.)

September 20, 1904, the attorney for plaintiffs, without noticing or in anywise adverting to the death of Amadeo, petitioned the trial court for the allowance of a writ of error from this court to review the above judgment, and his petition was allowed September 21, A. D. 1904 (R., 16, 17). Neither in the petition nor in the allowance thereof was any reference made to an appeal bond or other security for costs.

On December 20, 1904, an alleged appeal bond in the sum of \$500, wherein Pastor Marquez and Co. is named as principal and Lucas Amadeo and Felix Salazar are denominated sureties, appears to have been filed in the clerk's office of the district court, but such bond was not approved either by the trial judge or otherwise (R., 17).

Said bond differs in caption from the caption of this cause, being entitled "Antonio José Amadeo and Pastor Marquez and Co. vs. Northern Assurance Co." It recites that "whereas the above-named plaintiffs have sued out a writ of error to the Supreme Court," &c., and is conditioned that "the above-named plaintiffs shall prosecute said writ to effect," &c.

It is signed among other signatures

"Pastor Marquez & Com., en Liquid."

The writ of error in this cause, which is dated December 31, 1904, bears the allowance of the district judge (R., 21), who also signed the citation under same date (R., 19).

Both the writ of error and the citation declare "Antonio José Amadeo for the use of and together with the Pastor Marquez Company in liquidation" to be the true plaintiffs in the cause.

The writ of error asserts that the error complained of and intended to be reviewed wrought damage to "said Antonio José Amadeo for the use of and together with the Pastor Marquez Company in liquidation" (R., 19, 20).

Neither in the petition for the writ of error nor in the writ itself nor in the citation or the alleged appeal bond is any mention made of Pedro Salazar, the liquidator of Pastor Marquez and Company (R., 12).

The transcript of record was docketed in this court March 15, 1905.

### **STATEMENT OF FACTS IN CASE No. 200.**

In this case suit was instituted by Antonio José Amadeo alone upon two policies of insurance against the Royal Insurance Company. Suit was filed April 21, 1903. The policies of insurance were dated September 15 and December 21, 1884, respectively, and insured plaintiff against loss and damage for one year from their respective dates. The loss as alleged occurred February 7, 1885, and defendant refused to pay.

Defendant's demurrer to the declarations having been overruled (R., 15) defendant, among other defenses, pleaded prescription of fifteen years and transfer by plaintiff prior to institution of the suit of the policies and all interest therein.

To these pleas plaintiff at first demurred, but subsequently with leave of the court amended his declaration as follows:

In the title, after the name of the plaintiff, by adding the following words, "for the use of and together with the Pastor Marquez Company in liquidation," and by adding in the body of the declaration the following:

"And plaintiff avers that on or about August, 1885, the said policy was assigned to the Pastor Marquez Company, which is a company in liquidation and of which Pedro Salazar is liquidator" (R., 24).

Plaintiff's demurrer to defendant's pleas of prescription having been overruled and exception thereto noted plaintiff rejoined that the prescription had been interrupted "by extrajudicial demand;" to which defendant interposed a demurrer, which was sustained (R., 27).

And plaintiff having refused to plead further to defendant's plea of prescription and "failing to offer proofs as to the other issues made and tendered" judgment was on the 15th day of January, 1904, entered for defendant (R., 28), whereby it was adjudged:

"That the plaintiffs herein, Antonio José Amadeo, for himself and for the use and benefit of the firm of Pastor Marquez and Company, and Pedro Salazar as liquidating partner of the said Pastor Marquez and Company, take nothing by either of their said suits, and that the defendants go hence without day and recover of and from the said plaintiffs all costs in this behalf incurred or expended, for which execution may issue" (R., 28).

Petition for allowance of writ of error was filed September 20, 1904 (R., 29), and allowed the next day (R., 30).

An alleged appeal bond entitled "José Antonio Amadeo and Pastor Marquez and Company vs. Royal Insurance Co.," appears to have been "filed and approved Dec. 20th, 1904," although the copy of the bond with the transcript of record does not bear any indication of having been approved by the district judge. This bond is signed by "Pastor Marquez & Co. en liqui.," as principal (R., 31).

The writ of error and citation are subject to the same criticisms as in case No. 199.



Pedro Salazar as liquidator of Pastor Marquez and Company, though specially named in the judgment in this case, does not appear in any of the process papers as a party plaintiff in error, and in neither case was there summons and severance or any notice of the suing out of the writ of error given to the successors of the deceased plaintiff Amadeo.

### ARGUMENT.

The writs of error in these cases should be dismissed for manifest irregularities, both in form and in prosecution.

Antonio José Amadeo having died subsequent to judgment, and before any writ of error was sued out, it is certain that no valid writ of error could thereafter be sued out or prosecuted in his name, and assuming that "The Pastor Marquez Company" was otherwise authorized and competent to seek relief in this court, it could only do so in this case after notification to the succession of the deceased. It appears from the pleadings that Pastor Marquez and Company was in liquidation, and that Pedro Salazar was the liquidator. Under the Spanish law as under English common law this action, in so far as the favor of Pastor Marquez and Company was and is concerned, could only be maintained in the name of the liquidator.

While the absence of an appeal bond or the failure of the trial judge to note his approval thereon will not render the writs of error void, still the filing of duly approved security is prerequisite to the prosecution of such writs in the appellate court.

Passing the irregularities in the matter of the appeal bonds, which, in so far at least as the absence of the approval thereof by the district judge is concerned, might be corrected in this court—

Seymour *vs.* Freer, 5 Wall., 822;

Dodge *vs.* Knowles, 114 U. S., 430;

Stewart *vs.* Masterson, 124 U. S., 493;

Beardsley *vs.* Arkansas, &c., Co., 158 U. S., 123—

the defects in the writ of error are irretrievable.

As Antonio José Amadeo was dead at the time the writ of error was prayed for and issued, the suit, at least as to him, abated, subject to be revived only upon compliance with the statutory requirements (sec. 9, act of March 3, 1875, 18 Stats. L., 473) or the rules of this court.

Antonio José Amadeo, originally the sole plaintiff, by amendment to the declaration was made joint plaintiff with "Pastor Marquez Company, in liquidation," of which Pedro Salazar was the liquidator. Amadeo having died, his legal representatives or successors alone had the right to prosecute an appeal in the interest of his estate. The failure of his representatives or successors to appeal or sue out a writ of error did not authorize his coplaintiff to wage the writ on his behalf or in his interest or that of his succession, nor can such coplaintiff prosecute an appeal or writ of error to reverse the judgment against him, even where the right of action survives, except such death shall have been suggested upon the record (Rev. Stats. U. S., sec. 956).

In *Masterson vs. Herndon*, 10 Wallace, 416, it was said :

"It is the established doctrine of this court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a joint decree is rendered must join in the appeal or they will be dismissed. There are two reasons for this: (1) That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. (2) That the appellate tribunal shall not be required to decide a second and third time the same question on the same record."

In such cases no importance is to be attached to the technical mode of proceeding called summons and severance, but it is settled that it must appear in some way from the record that the missing parties have been notified to appear and had failed to do so, or, if appearing, had refused to join.

In the opinion of this court, delivered by Mr. Chief Justice

Fuller, in the case of *Meagher vs. Minnesota Thresher Mfg. Co.*, 145 U. S., 608, 611, it is said :

"It will be observed that plaintiffs in error are only a portion of the defendants who were proceeded against by the intervening petition, and what has become of the others does not appear. The case should have been determined as to all, before our interposition, if justifiable in any view, could be invoked."

To like effect are—

*Feibelman vs. Packard*, 108 U. S., 14.

*Estis vs. Trabue*, 128 U. S., 225.

*Mason vs. U. S.*, 136 U. S., 581.

*Hardee vs. Wilson*, 146 U. S., 179.

*Sipperly vs. Smith*, 155 U. S., 86.

In the case at bar no proceedings in summons and severance were had, nor does it appear that the death of Amadeo was suggested upon the record, nor that any notice of intention to sue out the writ of error was ever given to his succession.

A writ of error in such a case cannot be amended by inserting the names of other plaintiffs in error, nor can a judgment of severance be now had even with their consent.

*Mason vs. United States*, 136 U. S., 581.

More than two years have elapsed since the judgment complained of was entered, and no persons representing the interest of the Amadeo estate have voluntarily appeared in the case.

The writ of error, having been sued out without notification to the representatives of the deceased, may not be amended, but should be dismissed.

*Dolan vs. Jennings*, 139 U. S., 385.

As was said by this court in the last cited case, "The proper course of proceeding upon this subject has been wholly disregarded," citing—

Rev. Stats. U. S., §§ 955, 956.

Act of March 3, 1875, 18 Stats. L., 470.

Rules U. S. Supreme Court, No. 15.

But if it should be suggested that Amadeo was a merely nominal party without interest in the judgment, and therefore not a necessary party to the writ, we would reply that upon these records such fact cannot be assumed, and, the action having been originally instituted and conducted in the name and for the benefit of Amadeo alone and subsequently prosecuted to judgment for the joint benefit of Amadeo and Pastor Marquez Company, counsel should not now be permitted to assert, in the absence of proofs, that Amadeo was without any interest whatever in the subject-matter of the suit.

But if it should be thought otherwise, then the writ of error is without valid force, for, irrespective of the defect in the name of the commercial association or partnership, viz., Pastor Marquez Company as opposed to Pastor Marquez and Company, it is to be noted that said firm, both at the time it was made a party plaintiff and at the date of judgment, was in liquidation, and, under the Spanish law, as under the common law of England, the appeal, as well as the action, could only be properly prosecuted in the name of the liquidator.

Code of Commerce, articles 218-238.

Opinion Sup. Court of Madrid of October 12, 1888.

It is respectfully submitted the writs of error should be dismissed.

FRANCIS H. DEXTER,  
FREDERIC D. MCKENNEY,  
JOHN SPALDING FLANNERY,  
*Attorneys for Defendants in Error.*

## APPENDIX A.

IN THE SUPREME COURT OF THE UNITED  
STATES, OCTOBER TERM, 1905.

Nos. 199 and 200.

ANTONIO JOSÉ AMADEO, *for the Use of and Jointly with the*  
PASTOR MARQUEZ COMPANY, *in Liquidation, Plaintiffs in*  
*Error,*

vs.

THE NORTHERN ASSURANCE COMPANY, *Defendant in Error,*

and

ANTONIO JOSÉ AMADEO, *for the Use of and Jointly with the*  
PASTOR MARQUEZ COMPANY, *in Liquidation, Plaintiffs in*  
*Error,*

vs.

THE ROYAL INSURANCE COMPANY.

Now come The Northern Assurance Company and The Royal Insurance Company, defendants in error in the above-entitled causes, by their attorneys of record, Francis H. Dexter and Frederic D. McKenney, and suggest the death of Antonio José Amadeo, one of the parties plaintiff in said causes, said Antonio José Amadeo having died intestate at San Juan, Porto Rico, on the 14th day of May, 1904, leaving him surviving children as follows, Aurora, Carmen, Antonio, Rafaela, Belen, Teresa, and Rafael, as will more fully appear from the affidavit of W. D. Noble, hereto annexed and made a part hereof.

FRANCIS H. DEXTER,

FREDERIC D. MCKENNEY,

*Attorneys of Record for Defendants in Error.*

SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM, 1906.

Nos. 199 and 200.

ANTONIO JOSÉ AMADEO, *for the Use of and Jointly with the* }  
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ANTONIO JOSÉ AMADEO, *for the Use of and Jointly with the* }  
PASTOR MARQUEZ COMPANY, *in Liquidation,* }  
vs.  
THE ROYAL INSURANCE COMPANY.

On Writ of Error to the District Court of the United States  
for the District of Porto Rico.

UNITED STATES OF AMERICA, } ss:  
District of Porto Rico, }

I, David W. Noble, being first duly sworn, do depose and say that during his lifetime I was personally well acquainted with Don Antonio José Amadeo, the party named as plaintiff in error in the above cases; that said Antonio José Amadeo died at San Juan, Porto Rico, on the 14th day of May, 1904, and his body was interred at San Juan; that he died without a will, and that his only children were, to the best of my knowledge, Aurora, Carimen, Antonio, Rafaela, Belen, Teresa, and Rafael.

W. D. NOBLE.

Subscribed and sworn to before me this 15th day of November, A. D. 1905.

[SEAL.]

H. H. SCOVILLE,  
Clerk Dist. Court of U. S. for P. R.